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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

MAR 28 1994

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In the Matter of

Implementation of Section
309(j) of the
Communications Act

Competitive Bidding

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PP Docket No. 93-253

SOUTHWESTERN BELL MOBILE SYSTEMS INC.'S
PETITION FOR RECONSIDERATION OF
THE FIRST REPORT AND ORDER

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Dated: March 28, 1994

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To: The Federal Communications Commission

**SOUTHWESTERN BELL MOBILE SYSTEM INC.'S
PETITION FOR RECONSIDERATION OF
THE FIRST REPORT AND ORDER**

Southwestern Bell Mobile Systems, Inc. ("SBMS") files this Petition for Reconsideration of the First Report and Order in the above-referenced matter.¹

I. INTRODUCTION

On February 4, 1994, the Commission released its Order implementing rules intended to limit unjust enrichment of recipients of licenses granted by lottery. The new rules require the filing of all documents disclosing the consideration to be received by an applicant for transfer of control or assignment of a license that was acquired by the transferor or assignor through a system of random selection.²

¹First Report and Order, released February 4, 1994 (hereafter "Order").

²The following rules were amended to include transfer disclosure requirements: 1.924; 21.38 (microwave); 22.39 (cellular); 90.153; 94.47; and 95.821.

SBMS agrees that disclosure requirements may be an appropriate exercise of the Commission's discretion in response to Congress' directives if applied in those cases where the fear of profiteering or unjust enrichment genuinely may exist. The rules as written, however, are far too broad and encompass transfers and transactions by legitimate operators not engaged in profiteering, and as such exceed the scope of Congress' directive to the Commission. In addition, the inclusion of changes to the Commission's microwave rules are confusing, since those licenses are not granted through a system of random selection. The current coordination and filing procedure for microwave licenses does not constitute an auction, but neither can it be considered a system of random selection. The Commission should adopt the modification of its rules set forth in Attachment A hereto and should rescind the disclosure requirements added to the microwave section of its rules.

II. ARGUMENT

A. The Disclosure Requirements Should Apply Only to Transfers of Licenses by Lottery Winners Who Have Not Yet Begun to Provide Service to the Public

The Commission provides background on Congress' concerns about profiteering by lottery winners who have no intention of providing service to the public, and cites a specific example involving the sale of a cellular RSA license for \$62.3 million shortly after a construction permit was issued.³ This is the

³Order, ¶ 4.

type of transaction about which Congress is concerned - where the original applicant for the license has no intention or capability of providing service, but simply seeks to acquire then "flip" the license, receiving a windfall and delaying service to the public into the bargain.

Consistent with this Congressional intent, and as the Commission notes, the terms "unjust enrichment" and "speculation" in the lottery context for purposes of this rulemaking refer to the "transfer of a license acquired by lottery for substantial profit **prior to providing service to the public.**"⁴ The rules that the Commission actually adopted, however, go well beyond addressing those transfers that occur prior to the initial licensee's providing service to the public, and apply to all transfers by the lottery winner, without regard to if, or for how long, it has provided service to the public.

For example, Rule 22.39(d) applies the disclosure requirement to "an applicant for voluntary transfer of control or assignment under this section where the subject license was acquired by the transferor or assignor through a system of random selection." 47 C.F.R. § 22.39(d). It is not limited to an applicant who has not begun to provide service to the public. As such, this rule and the other rules ordered by the Commission are overly broad and require the disclosure of confidential and proprietary information in connection with

⁴Order, n.4.

legitimate, non-speculative transactions. Congress's concerns simply are not present after the original licensee begins commercial service, and therefore the disclosure rules should not extend to transfers made after a licensee has begun to provide commercial service to the public.

The Commission apparently recognizes, and its new rules⁵ reflect, that once the initial lottery winner has transferred its license to a third party, the fear of profiteering is diminished in subsequent transactions involving the transfer of the license. The disclosure requirements are limited to transfers of licenses acquired by the transferor through a system of random selection, rather than applying to all transfers of licenses originally issued through a series of random selection. Thus, if Company A wins the lottery and sells the license to Company B, when Company B later sells the license to Company C, the disclosure requirements will not come into play regardless of how much or little Company B initially paid for the license.

The fear of unjust enrichment is likewise absent once a licensee builds out and begins operation of a system. In fact, it appears based on the language of the Order that the Commission itself did not intend to burden past lottery winners who have built out their systems with these disclosure requirements. It states that as a result of its newly granted

⁵47 C.F.R. §§ 1.924(d), 21.38(g), 22.39(d), 90.153, 94.47(c), and 95.821.

auction authority, any new rules adopted would potentially apply only to the three classes of licenses that are still candidates for lotteries, indicating its intent that the rules have only prospective application.⁶ In so doing, the Commission overlooks the fact that the new disclosure rules as written apply to all licenses granted by lottery, including cellular licenses that were granted long before the passage of the Budget Act.

Unless the Commission limits application of its new rules, a cellular license lottery winner that actually built out a system and provided service to the public for ten years would be subject to these disclosure requirements if it were to transfer its license along with the rest of its cellular system. There is no justification for extending the disclosure requirements in this manner. As noted above, the definition of unjust enrichment is specifically limited to the concept that original licensee has not begun to provide service to the public. By applying the rules to a carrier that intended to and did provide service to the public, the Commission will not achieve its goal of exposing to scrutiny a suspect transaction in which the profiteer has no real confidential or proprietary business information worthy of protection. Rather, it will require the filing of otherwise proprietary and competitively sensitive financial information for no apparent reason.

⁶Order, ¶ 8.

B. Disclosure Requirements Should Not Be Applied to Microwave Licenses, Because They Are Not Acquired Through a System of Random Selection

The change to the microwave rules appears to be unwarranted, because those licenses are not granted through a lottery-like process. Specific microwave paths are identified by carriers desiring to license them, then are the subject of a prior coordination procedure with surrounding carriers. The process is not a random one, and is unlikely to lend itself to the sort of unjust enrichment problems troubling Congress. And, like the other disclosure rules, the microwave rules are overly broad and appear to apply regardless of a licensee's actual use of a microwave path prior to its transfer of the license.

III. CONCLUSION

The Commission should redraft its rules as shown in Attachment A hereto to clarify that its disclosure requirements apply only to licensees who have either not begun to offer service to the public or who have only offered service for some minimal period of time. The rule change in the microwave section of the rules either should be deleted, or the Commission should clarify that microwave licenses acquired through the coordination and application process currently used by cellular carriers does not constitute

acquisition "through a system of random selection."

Respectfully submitted,

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MOBILE SYSTEMS, INC.

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BELL MOBILE SYSTEMS, INC.

March 28, 1994

ATTACHMENT A

PROPOSED MODIFICATION OF DISCLOSURE REQUIREMENTS

§ 1.924 Assignment or transfer of control, voluntary or involuntary

(a) ***

(d) An applicant for voluntary transfer of control or assignment under this section, where the subject license was acquired by the transferor or assignor through a system of random selection *and the transferor or assignor has not begun to provide the licensed service to the public as of the date of its application for transfer*, shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option, agreements, management agreements, or other documents disclosing the consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g. management or consulting contracts either with or without an option to purchase; below-market financing).

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§ 21.38 Assignment or transfer of station authorization.

(a) ***

(g) *DELETE*

+++

§ 22.39 Transfer of control or assignment of station authorization.

(a) ***

(d) An applicant for voluntary transfer of control or assignment under this section, where the subject license was acquired by the transferor or assignor through a system of random selection *and the transferor or assignor has not begun to provide the licensed service to the public as of the date of its application for transfer*, shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the consideration that the applicant would receive in return for the transfer or assignment of its license. This

information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g. management or consulting contracts either with or without an option to purchase; below-market financing).

+++

§ 90.153 Transfer of control or assignment of station authorization.

An applicant for voluntary transfer of control or assignment under this section, where the subject license was acquired by the transferor or assignor through a system of random selection *and the transferor or assignor has not begun to provide the licensed service to the public as of the date of its application for transfer*, shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g. management or consulting contracts either with or without an option to purchase; below-market financing).

+++

§ 94.47 Transfer and assignment of station authorization.

(a) ***

(c) An applicant for voluntary transfer of control or assignment under this section, where the subject license was acquired by the transferor or assignor through a system of random selection *and the transferor or assignor has not begun to provide the licensed service to the public as of the date of its application for transfer*, shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g. management or consulting contracts either with or without an option to purchase; below-market financing).

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§ 95.821 Application for transfer of control.

(a) ***

(c) An applicant for voluntary transfer of control or assignment under this section, where the subject license was acquired by the transferor or assignor through a system of random selection *and the transferor or assignor has not begun to provide the licensed service to the public as of the date of its application for transfer*, shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g. management or consulting contracts either with or without an option to purchase; below-market financing).